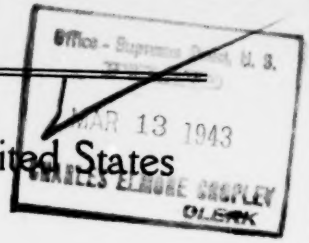
No. 824



Supreme Court of the United States

OCTOBER TERM, 1942.

IN THE MATTER OF ACQUIRING TITLE
by
THE CITY OF NEW YORK to certain lands under water, lands under water filled in, wharf property, wharfage rights, incorporeal hereditaments, together with riparian, franchise and incorporeal rights, if any, not now owned by The City of New York, situated on WARD'S ISLAND, in the Borough of Manhattan, City of New York, selected as a site for a public park, and approved according to law.

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC.,
and LAWRENCE WARDS ISLAND REALTY COMPANY,
Claimant-Appellants,

THE CITY OF NEW YORK,
Respondent,

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC.,
and LAWRENCE WARDS ISLAND REALTY COMPANY,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

GLEN N. W. MCNAUGHTON,
Of Counsel.

January, 1943.

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(NOTE: The reasons why this Court should review this case are set forth in the petition rather than in the brief, the latter being devoted more particularly to the soundness of our position upon the legal questions involved.)

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Supreme Court of the United States

OCTOBER TERM, 1942.

IN THE MATTER OF ACQUIRING TITLE

by

THE CITY OF NEW YORK to certain lands under water, lands under water filled in, wharf property, wharfage rights, incorporeal hereditaments, together with riparian, franchise and incorporeal rights, if any, not now owned by The City of New York, situated on WARD'S ISLAND, in the Borough of Manhattan, City of New York, selected as a site for a public park, and approved according to law.

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC.,
and LAWRENCE WARDS ISLAND REALTY COMPANY,
Claimant-Appellants,

THE CITY OF NEW YORK,
Respondent,

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC.,
and LAWRENCE WARDS ISLAND REALTY COMPANY,
Petitioners.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

To the Honorable the Supreme Court of the United States:

The petitioners above named respectfully show:

The United States is interested in this proceeding. It holds a deed of conveyance to it from the City of New York, (Rec. p. 204) for a portion of Damage Parcels Nos. 5 and

5A (Rec. p. 28) the title to which parcels have been awarded herein to the City of New York, and for which damages have been awarded to the City of New York as owners of the entire parcels for the sum of one dollar ($1.) for each parcel, though the area involved in the lands under water filled in contained in the Damage Parcel 5 portion covered by the deed of conveyance aforesaid to the United States of America is about 159 feet wide along the foreshore sea wall, and 55 feet deep, and the portion of underwater lands not filled in covered by said deed and contained in Damage Parcel 5A is about 159 feet wide by 300 feet more or less in depth, or over an acre in area, and for which the usual award in condemnation proceedings in accordance with the present theory of appraisal of market value in this vicinity at the very lowest $1. per square foot, and the award to the owner thereof should be not less than Forty-four thousand dollars ($44,000.), and the award to the lands under water filled in, the portion in Damage Parcel No. 5, should be at the rate of double that under water in accordance with the usual value of appraisal in this vicinity, or over $2. per square foot, or over the sum of $16,418.00, or a total of $60,418 which the United States may claim as its award if fair, just and adequate compensation be paid in this proceeding. (See Rec. p. 518, Map U. S. Lighthouse, Third District) (Rec. page 452. Sketch accompanying Sinking Fund Proceedings, showing lands under water and lands under water filled in) (Rec. page 418, Sinking Fund Proceeding Minutes of the City of New York, and Rec. page 7 for final decree awarding title and damages for entire parcels Nos. 5 and 5A herein to The City of New York.)

The United States is not a party hereto, and should intervene and join in the position for a writ of certiorari herein.

The dispute is as to title and value.

This is an appeal from an order of affirmance of the Court of Appeals of the State of New York affirming an order of affirmance of the Appellate Division of the

Supreme Court of the State of New York, First Department of the final decree of Mr. Justice McLaughlin in this condemnation proceeding, which acquired for park purposes land under water and filled in land around Wards Island.

Metropolitan-Columbia Stockholders, Inc., appeals with respect to Damage Parcels Nos. 16, 16a, 16c and 16d, and Lawrence Wards Island Realty Company appeals with respect to Damage Parcels Nos. 5, 5a, 9, 9a, 17, 17a and 25a, Damage Map (opp. p. 28 Rec.).

This condemnation proceeding was begun in connection with development of a public park by the City on Wards Island, which is located in the Borough of Manhattan, County of New York, at the East and Harlem Rivers, and Little and Big Hell Gate.

The land condemned was land under water and land filled in in 1937, but originally in 1811 at the time the predecessors in title to the claimants herein acquiring title thereto by grant from the State of New York, all foreshore and land under water. The Grant from the Commissioners of Land Office of the State of New York was of all the foreshore and land under water surrounding Wards Island, the land under water being 150 feet outward from the foreshore on the northwest side of Wards Island, and 300 feet outward from the foreshore from the balance of the Island.

The dispute arises as to the ownership of the lands under water and foreshore condemned in this proceeding, and awards therefor.

The claimant-appellant petitioner Metropolitan-Columbia Stockholders, Inc., holds title to Damage Parcels Nos. 16, 16a, 16c and 16d. The Trial Court held that title to damage parcels 16, 16a and 16d were in the City of New York, and title to damage parcel 16c was in the Metropolitan-Columbia Stockholders, Inc.

The Lawrence Wards Island Realty Company holds title to Damage Parcels 5, 5a, 9, 9a, 17, 17a and 25a. The Trial Court held that title to Damage Parcels Nos. 5, 5a,

9, 9a and 17, was in the City of New York, and that the Lawrence Wards Island Realty Company was the owner of Damage Parcels 17a and 25a.

The City claims title to all of the land included in the condemnation proceeding.

The claimant petitioners contend (1) the City has no riparian rights of easement from its upland lots over the foreshore and lands under water owned by the claimants herein adjacent to the City's upland holdings as these rights of easement of passage were forfeited by the City and/or its predecessors in title of the upland by the illegally filling in by them of the foreshore and the building of a seawall along it over the lands of claimants, without the consent of the claimants or their predecessors in title. The City claims it has riparian rights of access and egress to the river channel over claimants underwater lots from City's upland holdings adjoining.

Claimant petitioners contend (2) that if the City has such riparian easements of passage, the exercise of this right of passage and wharfing over the claimants underwater lots and carrying goods and passengers over the foreshore of claimants is only an exercise of a right of easement of passage, and is not an act by the City of hostile occupancy, open and notorious with a claim of title in fee simple by the City, and that they were under an implied grant arising by implication from the deeds of conveyance to the City of its upland adjacent to the foreshore passed over in egress and access and wharfing out by building docks thereon for communication to the River Channel.

The claimants petitioners contend that the riparian rights, if any, of the City, are only a right of reasonable passage, and do not exhaust the uses of the filled in lands and lands under water belonging to claimants. (See *Inwood Hill Park,* 219 A. D. 478, 220 N. Y. S. 298; *Hedges* v. *West Shore,* 150 N. Y. 150; *Barnes* v. *Midland,* 193 N. Y. 378, at 386.)

Claimant petitioners further contend that it is not necessary to fill in the lands under water to build docks or

warehouses on such docks, and that as a matter of fact and usage all docks surrounding the Island of Manhattan are built on piles and not on solidly filled in lands under water, and that therefore these underwater lands herein condemned are of substantial value, and claim that therefore the Trial Court erroneously held that the condemned parcels of lands under water are without market value, and that said holding is contrary to law requiring just compensation under the federal and state constitutions be paid for property taken by condemnation (Rec.—final decree, fols. 19-35; *Appleby* vs. *City of New York*, 271 U. S. 364, at 402).

The City contends that the land under water must be filled in to have substantial value.

Claimant petitioners contend that the federal government under rules of the War Department controlling navigable rivers prohibits the building of wharves on filled in lands beyond the bulkhead line of solid fill, and only permits wharfing to be built outward of that line of solid fill to the pier head line, on piles driven into the lands under water. That therefore the right to build docks on piling on lands under water without filling in makes those lands under water of substantial value, as it cheapens the cost of building the wharves, and increases the revenues from wharfage. The entire theory of Mr. Justice McLaughlin in holding lands under water must be filled in to be valuable is contrary to the theory and practice of the War Department prohibiting those lands from being filled in, but allowing docks to be built on piling (see *Inwood Hill Park* case, *supra*) where an award of $251,707.26 was awarded for 573,854 square feet of land under water owned by the City, and subject to riparian easements of upland owners who were private corporations and individuals. This case held, at page 301, that these lands have substantial value, and it might be leased to be used for dock purposes and a large revenue result.

The *North River Water Front* case, *Matter of City of New York*, 219 A. D. 87, reversed the decision of the lower

court and sustained a substantial value of about $2,272,-808.41 for two parcels of lands under water and filled in lands, amounting to about 100,000 square feet each. It was the opinion of the lower court that it might be more costly to fill in this land than it would be worth after filling in, but the Appellate Division of the First Department sustained the condemnation award. This came up during the *Appleby* case, 271 U. S. 373.

The *Main Street* case, 216 N. Y. 67 (City Island) held that the public right and private right of passage did not exhaust the use of underwater property, and that the owners must be compensated.

The City claims title by adverse possession to Damage Parcels 16d and 17. Claimant petitioners contend that the Trial Court erred as a matter of law in awarding title to these lots to the city on the grounds of adverse possession. (Rec. fols. 76-81, fols. 19-35.) That the use by the City to dock out and pass over these parcels was one of the right of easement only. That the filling in of the foreshore and building of the seawall along it were not improvements amounting to adverse possession, being merely passing over the property. There were no buildings on it, nor was it ever fenced in for the required statutory period necessary to prescription or to found it upon the theory of a lost grant. Such filling did not prevent any one of the public from walking over the land filled in after filling in. Such filling must be by the legal owner. The records show no evidence of cultivation or cutting timber, and the Damage Map (Rec. p. 28) shows only docks and railroad tracks and coal hoppers on these properties Damage Parcel 17, which were merely used to exercise the rights of passage and hauling goods across them stored in transitu on the docks or foreshore. Petitioners contend the decree of the Trial Judge was contrary to law, and that the affirmance of it by the Appellate Courts was contrary to law of adverse possession of Sections 35 and 37, Civil Practice Act, and of the common law.

The claimant petitioners contended that the Trial Court erred in awarding Damage Parcels 5, 5a, 9, 9a, 16 and 16a,

to the City for the reason these parcels adjoined the upland holdings of John Fleetwood Marsh, who in 1811, when the original grant was made by the State in common to all the upland owners applying for the grant, was not a signer of the original application for the grant, and yet was an owner at the time the grant was made. An original applicant, Bartholomew Ward, had deeded some of his holdings to Marsh before the grant was delivered, but had not recorded his deed until 1812, a year after the grant was made. This is a mere presumption that Marsh was the owner, and claimant petitioners contend that this presumption was rebutted by the fact that the Attorney General of the State of New York, a member of the Land Office Commission making the grant, had made an examination as to all owners, and reported in 1810 before the grant was made, that it was being made to all the owners of the upland on Wards Island, and that the applicants for it were all the owners thereof. The City contends to the contrary, that title passed to the upland to Marsh on delivery of the deed from Bartholomew Ward.

Claimant petitioners contend that Bartholomew Ward was never the owner of upland adjacent to the westerly half of Damage Parcels 9 and 9A, and that therefore the award of such westerly half to the City is contrary to law as based on deed to John Fleetwood Marsh. Claimant petitioners contend that the award of title to the City of Damage Parcels 5, 5A, 9, 9A, 16 and 16A is contrary to law as the matter is *res adjudicata* by reason of the decree in the *Beach* v. *Mayor* partition action of 1870, 45 Howard 357, to which the City was a party, and which claimed title to all these parcels, and that this question can not be now raised herein.

Mr. Justice McLaughlin in the trial court made an award of one dollar ($1.) to petitioner claimant Metropolitan-Columbia Stockholders, Inc., for Damage Parcel 16C, and the same amount to Petitioner Claimant Lawrence Wards Island Realty Company for Damage Parcels 17A and 25A for 7⅓ acres of land under water, which is located

in the busiest waterfront section of New York Harbor, saying this was the actual value (See Rec. fols. 19-35). Your petitioners contend that such award is contrary to Section 1, Article XIV of the Constitution of the United States of America, and to Section 6, Article 1, of the Constitution of the State of New York, as it constitutes a taking of claimants' property without due process of law, and is a taking of private property without just compensation.

We urge as grounds for certiorari the following:

1. The award of one dollar ($1.00) as actual value of each of Damage Parcels 16C and 17A and 25A is contrary to the United States Constitution and Constitution of the State of New York, and contrary to decisions of this Court in the *Appleby* case (*supra*), *Inwood Hill Park* case, *supra*, *N. Y. Waterfront* case (*supra*). The act of the U. S. Navy in paying into the U. S. District Court of the Southern District of New York, the sum of $2,610,000. for condemnation of the lands under water and pier at the foot of 46th Street and the Hudson River in the spring of this year as evidence of fair value, for a plot of land under water about 1000 feet long and 125 feet wide, and the pier on piling, is a fair indication of market value of lands under water. This is the pier where the U. S. S.S. Lafayette sank.

2. That the decree of the trial judge is contrary to law as to parcels 5, 5a, 9, 9a, 16 and 16a, as the title to them is *res adjudicata,* and they belong to claimants herein.

3. That the Trial Court in awarding Damage Parcels 16D and 17 to the City has misconstrued the law of adverse possession and is contrary to the provisions of Sections 35 and 37 of the New York Civil Practice Act.

4. That the Trial Court in holding the lands under water have no actual value unless filled in is contrary to the theory of value as established in New York State, and is contrary to laws of the United States governing navigable waters. That the practice of the War Department is not to permit the filling in of lands in navigable river by solid

fills as it cuts down the tidal capacity of the river, increases the rival tidal currents, and increases the costs of navigation, hence the prices of commodities carried by waterborne commerce.

5. That the property claimed by adverse possession by the City was never fenced in by the City or its predecessors in title, and was never occupied by it under color of title, as the lease by the City of New York to the State of New York of Wards Island is too vague, being merely of "its interest in Wards Island," to cover the lands of claimant petitioners. (See *Mare Island Navy Yard* case, decided by this Court in June, 1942; *Stewart* v. *U. S.*, 62 Supreme Court 1154, 1158.)

6. That the use of easement of riparian owners must be reasonable and are not a broad easement, and that Justice McLaughlin's holding the upland owners have a broad easement of access is contrary to decisions of this and other courts of the State of New York, and is detrimental to national interests throughout the nation if such theory is sustained by this Court. (See *Hedges* v. *West Shore, supra; Barnes* v. *Midland, supra.*)

7. That the filling in of the foreshore by the upland owner was an illegal trespass and destroyed his riparian rights. See *Tiffany* vs. *Oyster Bay*, 134 N. Y. 15, and *Harway* v. *Partridge*, 203 A. D. 174, which were entries under color of title, and made exceptions to the general rule that trespass in filling in cut off wrongdoers' easement of passage. (See *Blakeslee* v. *Commissioners of Land Office*, 135 N. Y. 447, 450.)

8. That a navigable river is a public highway from high bank on one side to high bank on the other, and can not be filled in without consent of the State and Federal Governments. (See Cooper's Justinian, Title II, Twelve Tables, sections 1 to 5, page 68, as to civil law governing riparian rights.) Therefore that the decree of trial court is contrary to law.

9. That the State of New York was trustee in liquidation of Damage Parcels 16, 16a, 16c and 16d, from 1911 to 1933, as this property was in the hands of the Superintendent of Insurance of the State of New York as liquidator for the Columbia Life Assurance Society, predecessor in title to Metropolitan-Columbia Stockholders, Inc., and therefore that the State of New York as tenant of this property could not be used to hold possession of it adversely for the City of New York, as it would be using the possession of trustee adversely to its trust, contrary to law. (See *Michoud* vs. *Girod*, 4 How. 502, *Jackson* v. *Smith*, 254 U. S. 586, *Magruder* v. *Drury*, 235 U. S. 106, 149 U. S. 181, *Davis* v. *Gray*, 16 Wall. 203, 217, *in re Gilbert*, 276 U. S. 294.)

10. The lease by claimant Metropolitan-Columbia Stockholders, Inc., to M. & J. Tracy of lands under water on Damage Parcel Nos. 16a and 16c for erection of a tie rack to moor coal barges shows a substantial value can be obtained by rentals of land under water not filled in (Rec. p. 434) and the lease in 1907 by the New Jersey Central Railroad of lands under water in the Harlem River at 10¢ per square foot per annum and its renewal at 15 cents per square foot in 1937 by the City of New York to the said railroad for erection of a slip bridge, for 5 years, with privilege of renewal for another 5 years, shows substantial value of lands under water subject to upland riparian rights (Rec. p. 121).

11. Assessment of taxes on lands under water of claimant petitioners (See Damage Map, p. 28) and receipt of taxes by the City since 1870 on underwater lots to 1936, refute the claim of adverse possession by the City, and the attempt by the City to foreclose tax liens on Damage Parcel Nos. 16, 16a, 16c and 16d, and the payment by the said claimant of $20,909.91 to the City for taxes, estops the City from setting up ownership by adverse possession. (See Rec. pp. 278, 496a.)

12. Claimant petitioners contend decision of Judge Leventritt (in *Reynolds* v. *Britton*, N. Y. Law Journal,

Jan. 7, 1907), that filling in land under water and building a sea wall were not acts of adverse possession on the foreshore of Wards Island, show the decision of the trial court in the instant proceeding to be erroneous and contrary to law.

13. That Wards Island is connected by vehicular access with Manhattan by reason of the Triborough Bridge and connecting vehicular traffic bridges from Randall's Island that were built in 1936 and 1937, before the condemnation proceeding herein, and therefore the values of underwater lots and lands filled in on Wards Island are greater since the construction of these bridges; and, being at the mouth of the Harlem River, these lots are of greater value than those further up the Harlem River because of the higher cost of towage of boats the further up the river they must be towed due to passing bridges and danger of collision with bridge piers in the center of the Harlem River. That the Harlem River is one of the busiest water transportation highways in New York Harbor and a boat terminal yard tie rack is necessary for mooring of boats there in order to take favorable tides to railroad terminals in New Jersey, which can not be reached in one tide, and therefore tie racks and dolphins made out of piles erected on lands under water are valuable structures as they would yield substantial revenues if built by claimants on their underwater lots.

14. That the grant by the State in 1811 to the Wards and Lawrences, then owners of all the uplands on Wards Island, contained the implied agreement by the Grantor States that it would not grant the same lands to anyone else if the original grant were defective. The petitioners herein claim for this reason the Grant by the State of New York in 1888 to the City of New York of lands under water not previously granted located in the Harlem River around Wards Island, did not convey to the grantee the lands under water previously granted to the original owners of upland on Wards Island in 1811, and that the pro-

vision, excepting lands under water previously granted, in the Grant of 1888, applies to the Damage Parcels of petitioners herein (Rec. p. 217.)

15. That the Grant of 1811 by the Commissioners of Land Office was not governed by any statutory provision of the State of New York restricting grants of lands under water surrounding Wards Island to the adjacent upland owners, as that restriction was not extended to Wards Island until 1813. Your petitioners therefore contend that the deeds to John Fleetwood Marsh dated 1810 did not invalidate the grants of lands under water taken in common by the Wards and Lawrences.

16. That title in claimants since 1811, or in their predecessors in title, recognized for over 125 years, and taxed by the City since 1870, should not now be disturbed, and that at this late date the City is estopped from claiming title. (Rec. p. 49¢a.)

There is presented herewith a certified transcript of the record in this cause in the Court of Appeals of the State of New York.

WHEREFORE petitioners respectfully pray for the allowance of a certiorari to the Court of Appeals of the State of New York, to the end that this cause may be certified to this Court for determination by it as provided in 28 U. S. C. A., Sec. 347(a).

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the same is well founded and the case is such that the prayer of the petition should be granted.

ARCHIBALD N. JORDAN.

BRIEF IN SUPPORT OF FOREGOING PETITION.

The opinion of the trial court is printed at Rec. 525, and final decree at page 7, the order of affirmance of the Appellate Division of the Supreme Court of the State of New York—First Department at Rec. 549, and order of affirmance of the Court of Appeals of the State of New York at Rec. .

Grounds of Jurisdiction.

The decree to be reviewed was rendered March 24, 1939, Rec. page 7, and the order denying re-argument in the Court of Appeals of the State of New York was rendered October 15th, 1942, and entered with the Clerk of the Supreme Court of the State of New York, New York County, October 26th, 1942.

ARGUMENT.

POINT I

The award of One Dollar is unconstitutional.

The award by the court of one dollar each for damage parcels of petitioners-claimants is contrary to the provisions of the Federal and State Constitutions requiring due process of law, and just and adequate compensation for taking private property.

POINT II

The theory of broad easements of riparian owner over the foreshore is erroneous theory of value and contrary to law.

To uphold the decision of the trial judge in this case requiring lands under water be filled in solidly to have substantial market value, means that the United States Supreme Court will establish a new theory for the valuation of lands under water, contrary to the present theory of substantial value for lands under water not filled in.

POINT III

Claimants' property was not fenced in by the City or its tenant the State, so adverse possession could not be obtained for statutory period of fifteen years, and it was not built upon. The decision of adverse possession is contrary to law.

The *Matter of the City of New York, Willard Parker Hospital* case, 217 N. Y. 1, held that adverse possession was obtained against the City of New York by reason of the upland owner filling in the lands under water belonging to the City, and fencing them in for the prescribed period. In the *Wards Island* case there was no fencing of claimants' lots, or the erection of buildings upon them, except a small encroachment of a storage warehouse adjoining. The situation in *New York City* v. *Wilson,* 278 N. Y. 86, the land filled in was built upon and substantial buildings, slaughter houses, etc., erected thereon. This case is relied upon by the Trial Court (Rec. fol. 1610), but the facts differ substantially from the *Wards Island* case, and the *Wilson* case does not sustain the theory of adverse possession as applied to the *Wards Island* situation where no buildings were erected above ground, and no fencing in was done.

POINT IV

The decision of the trial court holding the upland owners have broad easements of access and egress over the adjacent foreshore and underwater lands, is injurious to the national interests.

We urge that Mr. Justice McLaughlin's theory of a broad riparian easement in favor of the upland owners over the adjoining foreshore and lands under water adjacent thereto is contrary to the previous decisions of this Court and of the courts of other states, and will prove,

if sustained by this Court, harmful to the policy of the United States Government in developing our interstate and foreign commerce by the improvement of our harbors and rivers on tidal waters for the owners of the foreshore and lands under water therein will be discouraged from expending capital to develop and improve these lands by the erection of wharves and warehouses throughout the nation. Therefore storage rates and wharfage rates will be increased, or not reduced, and the public will pay higher prices for commodities for port charges will be increased and added to the cost of transportation of the goods, all paid for by the ultimate consumers. The War Department prohibits filling in, but consents to building on piling on underwater lands.

The petition should be granted.

Respectfully submitted,

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

GLEN N. W. MCNAUGHTON,
Of Counsel.

January, 1943.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 824

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC., and LAWRENCE WARDS ISLAND REALTY COMPANY,

Petitioners,

vs.

THE CITY OF NEW YORK.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

GLEN N. W. MCNAUGHTON,
Of Counsel.

April 26, 1943.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 824

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC., and LAWRENCE WARDS ISLAND REALTY COMPANY,

Petitioners,

vs.

THE CITY OF NEW YORK.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Your petitioners in submitting their reply brief respectfully contend:

That the question of title to damage parcels is *res judicata.* The matter of the deeds to Marsh having been raised in the *Beach* case (45 Howard 357) it can not be again raised between the same parties. *Res judicata* settles the controversy between the parties to it. *U. S.* v. *Pink,* 315 U. S. 203, at 216; *Aurora City* vs. *West,* 74 U. S. 82, at 102-103; *Kelliher* vs. *Stone & Webster,* C. C. A. Fla., 75 Fed. 2nd, 331, 332.

The relation back of the Water Patent of 1811 to its inception in 1809 refutes the claim of title by the City based on the deeds to Marsh, which were executed and dated four months after the inception of the Water Grant. *Stark* vs. *Starr,* 6 Wallace 402, at 418.

In interpreting the Grant of 1888 (City Ex. 30, R. 224) and Chapter XXIV, Laws of State of New York, 1813

(R. 19-20, Claimants' Objections Nos. 11 and 12), the Supreme Court judgment, as affirmed by the Court of Appeals, has construed them in such a manner as to impair the obligations of the deed given by the State to the predecessors in title of your petitioners contrary to Article 1, Section 10 of the United States Constitution, and as to deprive your petitioners of property without due process of law contrary to the Fourteenth Amendment of said Constitution. *Appleby* vs. *New York*, 271 N. Y. 364, 374; *Fletcher* vs. *Peck*, 6 Cranch. 87, 137; *Farrington* v. *Tennessee*, 95 U. S. 679, 683; *Stewart* vs. *Jefferson Police*, 116 U. S. 135; *Woodruff* vs. *Trapnall*, 10 How. 237.

The question of adverse possession is *res judicata*, having been settled in the *Beach* case, *supra; U. S.* v. *Pink*, *supra*. For the court below to have based its decision on adverse possession in the instant case is unconstitutional and contrary to the Fourteenth Amendment as a taking of property without due process. It is for the City to come in now and justify this taking.

Title to the bank of a navigable river may not be acquired by adverse possession.

The banks of a navigable river from the high bank on one side to high bank on the other and the land under water are held by the civil law to be a public highway. Justinian Twelve Tables, Lib. II, Title I, Sections 1 to 5, pages 67-68 Cooper's Justinian. The Magna Charta of England recognizes this: Section 33, provided as follows:

> "All wears for time to come, shall be put down in the rivers of Thames and Medway and throughout all England, except upon the sea coast."

This rule was followed in *Arnold* vs. *Mundy*, 6 N. J. Law 1; *Martin* v. *Waddell*, 16 Pet. 367 at 418.

Section 40 of the New York Civil Practice Act provides the only methods by which adverse possession may be acquired not under a claim of color of title:

"1. Where it has been protected by a substantial enclosure."

"2. Where it has been usually cultivated or improved."

These damage parcels were never fenced in or cultivated or improved, and the awarding of Damage Parcels 16c and 17 to the City is unconstitutional and contrary to the Fourteenth Amendment. *Ward* v. *Cockran,* 150 U. S. 597, at 609. The trial court is therefore clearly in error.

The City does not explain why it did not exempt the U. S. Lighthouse plot when it filed its petition to ascertain compensation. It exempted other parcels. The award to the City of the area covered by the U. S. Lighthouse deed is unconstitutional, being a taking of property without due process and without just compensation contrary to the Fourteenth Amendment.

The award by the Trial Court of the value of one dollar for damage parcels 16c and 17 is unconstitutional and violative of the due process clause of the Fourteenth Amendment of the Federal Constitution as failing to award just compensation. The decision was on an erroneous theory of value that the damage parcels had no value unless filled in. This finding by the Trial Judge had no support in the evidence in the record. *New York* v. *Sage,* 239 U. S. 59 at 61; *Boom* v. *Patterson,* 98 U. S. 403, at 407.

The holding by the Trial Judge that the upland owner had a broad easement of access over the damage parcels of petitioners is contrary to the ruling decision that the upland owner has only a reasonable easement. It is a taking of property without just compensation contrary to the Fourteenth Amendment. *Hedges* vs. *West Shore,* 150 N. Y. 150, which is a case of a riparian owner devoting property to certain uses inconsistent with the existence of a structure in a public river some two hundred feet below high-water mark, and between the plaintiff's upland property and the navigable channel, constituting an obstruc-

tion to the plaintiff's access from its property to the channel.

Jurisdiction of this Honorable Court requires no argument. It is sustained by *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago*, 166 U. S. 226, at 237, 239 and 264.

The cases cited by the City are not on all fours with the instant case and do not support the points on which they are cited. Every one is easily distinguishable.

In Conclusion

Title to the damage parcels is *res judicata*. The question of adverse possession is *res judicata*. The ignoring of the rule of *res judicata* by the Trial Court in awarding titles to the City is arbitrary and contrary to the provisions of the United States Constitution relating to due process as set forth in the Fourteenth Amendment.

Petitioners respectfully submit the writ of certiorari should be granted.

April 26, 1943.

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

GLEN N. W. MCNAUGHTON,
of Counsel.

(6)

APR 13 1943

Supreme Court of the United States

October Term, 1942. No. 824.

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC., and LAWRENCE WARDS ISLAND REALTY COMPANY,

Petitioners,

against

THE CITY OF NEW YORK.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

April 9, 1943.

THOMAS D. THACHER,
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New York, N. Y.

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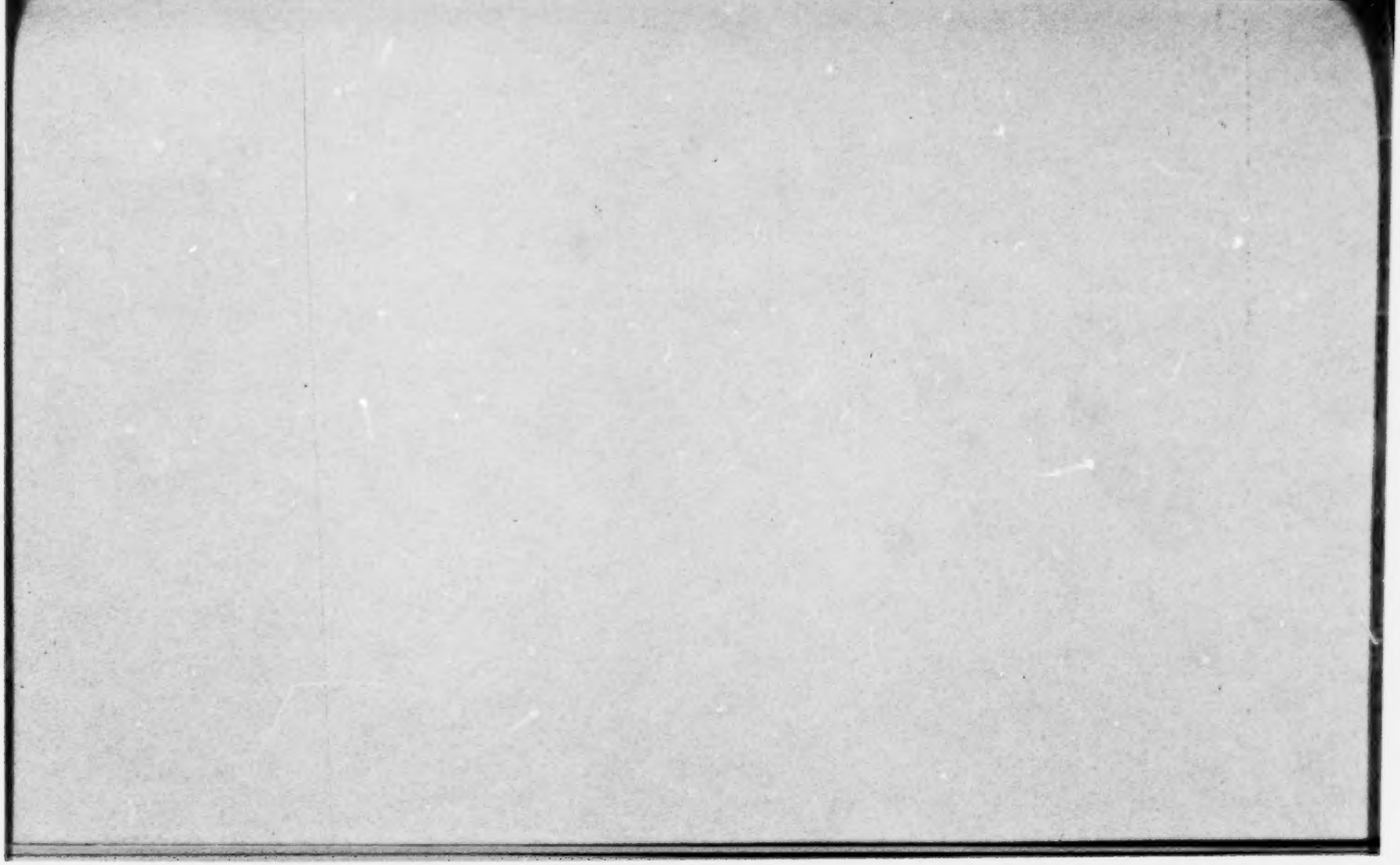
LEO BROWN,
of Counsel.



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The discursive petition which has been filed herein is devoted, to the extent of about 90% of its contents, to the discussion of questions of state law, which obviously cannot be reexamined in this Court. The federal questions lack merit, as we shall proceed to show.

(1)

The argument, stated in the heading to Point I of the petition, that the award is inadequate because nominal ($1), raises no federal question, for the reason that, upon the facts shown in the record, the petitioners' rights were reduced to nominal dimensions by principles of state law of universal application and unquestioned constitutionality, to wit:

(*a*) there can be no ownership of lands under water divorced from ownership of the adjacent upland;

(*b*) any person who, by some artificial construction of a deed, found himself the owner of such lands under water, could not use the lands under water for any other purpose than passage, and, if he attempted to erect permanent structures thereon would at once be subject to a suit for a mandatory injunction at the instance of the upland owner.

To these principles of law should be added, as a reenforcement, the factual circumstance that, granting, for the sake of argument, that petitioners had the right to fill in the lands under water claimed by them, the cost of filling in would be greater than the worth of the lands after filling in was completed (R. 240-241). Thus again their value to the petitioners was purely nominal.

In support of proposition (*a*) *supra*, we may cite N. Y. Laws 1786, ch. 67, which was reenacted in substance by L. 1801, ch. 69. These were cited and relied on by the Supreme Court, New York County, herein (R. 230). See also *Blakeslee Mfg. Co.* v. *Blakeslee's Sons Iron Works*, 129 N. Y. 155 (1891), where the Court said (pp. 159-160):

> "The right or privilege conferred by the statute is appurtenant to the upland and vests in the owner thereof, and it never can exist severed from such ownership. The title set up by the defendant under mesne conveyance from Quimby of the lands under water in front of the Gregory and Smith lot cannot, therefore, prevail."

This, and other cases to the same effect, will be found analyzed at some length in the opinion of the Supreme Court, New York County (R. 232-236). See also *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 435 (1892).

In support of proposition (*b*) *supra*, we may cite *Matter of City of New York*, 168 N. Y. 134, 144 (1901); *City of New*

York v. *Wilson & Co.*, 278 N. Y. 86, 100, 101 (1938); and *City of New York* v. *Third Ave. Ry. Co.*, 264 App. Div. 193, 194, 34 N. Y. Supp. (2d) 874 (1st Dept., 1942). See also *Illinois Central R. Co.* v. *Illinois, supra*, 146 U. S., at pp. 445-447.

The principle has been adhered to so consistently that if the riparian owner builds, for example, a restaurant upon piers extending over the water, the structure cannot be made the basis of a claim for compensation when the City later takes title to the upland and the foreshore in eminent domain proceedings. See *Matter of City of New York (Neptune Avenue)*, 254 App. Div. 690, 3 N. Y. Supp. (2d) 825 (2nd Dept., 1938), aff'd 280 N. Y. 604 (1939), where the Appellate Division said (p. 690):

> "Nor is appellant Lundy entitled to any award for the structures maintained on the damage parcels in which he had riparian rights and on the bed of Ocean avenue to the west, in which he had no right whatever. The erection of such structures and their use as a restaurant are not a proper exercise of riparian rights."

Of course had the structures been wharves and piers erected in aid of commerce and navigation, the Courts would have had to entertain the claim for compensation. *Appleby* v. *City of New York*, 271 U. S. 364 (1926). The reliance of the petitioners (brief, pp. 6, 8) on this case is thus clearly seen to be misplaced.

(2)

The contention that the obligation of contracts clause has been violated is made quite inarticulately in this Court. All that petitioners say (p. 11) is that the grant of 1811 (Claimants' Ex. 6, listed at R. 252 but not reprinted) "contained the implied agreement by the Grantor States [*sic*]

that it would not grant the same lands to anyone else if the original grant were defective."

Now the grant of 1811 was of lands under water to a person not the owner of the upland, and was void for contravention of the statutes cited *supra*, page 2. It was void for all purposes, and did not even possess such latent vitality as would operate 77 years later to prevent a new grant of lands under water to the then owner of the upland, the City of New York. Certainly a holding of the state courts to this effect does not affront the contracts clause; for the holding is simply one of consistent adherence to, and respect for, the policy declared by the legislation of 1786 and 1801, cited *ante*, page 2. The earlier grant having been abortive and void, it could create no contract rights entitled to constitutional protection.

(3)

The statement of the petitioners (p. 1) that the "United States is interested in this proceeding" is a ridiculous *ad captandum* attempt to exalt an unmeritorious case into one worthy of this Court's attention. The title of the Government to the lighthouse site on Ward's Island is in no way aspersed. We put in evidence our deed to the Government (City's Ex. 28, R. 146-147) to show that the area of the site was excepted from the condemnation, and to show that at the date of the deed (1905) the City (and not the petitioners or their predecessors) had title to, and was exercising a *jus disponendi* over, the general area in question.

(4)

The petitioners' want of confidence in their constitutional point is manifested by the circumstance that they took their appeal from the decision of the Appellate Division to the Court of Appeals of the State of New York, *by*

leave of the Appellate Division. 263 App. Div. 809, 33 N. Y. Supp. (2d) 812. Under the Constitution and Civil Practice Act of the State of New York an appeal to the Court of Appeals may be taken *as of right* from an order of unanimous affirmance in the Appellate Division, in cases where there is directly involved the construction of the Constitution of the United States or the validity thereunder of a statutory provision of the State.

(5)

It is significant also that the petitioners are unable to show to this Court a certificate from the Court of Appeals to the effect that a question under the United States Constitution was raised and necessarily passed upon in deciding the appeal. For the form of such certificate which the Court of Appeals constantly uses in cases of this sort to facilitate the review of its determinations by this Court, see *People* v. *Kesbec, Inc.*, 282 N. Y. 777 (1940), and *People* v. *Beck*, 288 N. Y. 672 (1942), cert. den. 317 U. S. , 63 Sup. Ct. 433 (1943).

Conclusion.

The petition for certiorari should be denied.

April 9, 1943.

Respectfully submitted,

THOMAS D. THACHER,
Corporation Counsel,
Counsel for Respondent.

PAXTON BLAIR,
LEO BROWN,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 824

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC., and LAWRENCE WARDS ISLAND REALTY COMPANY,

Petitioners,

vs.

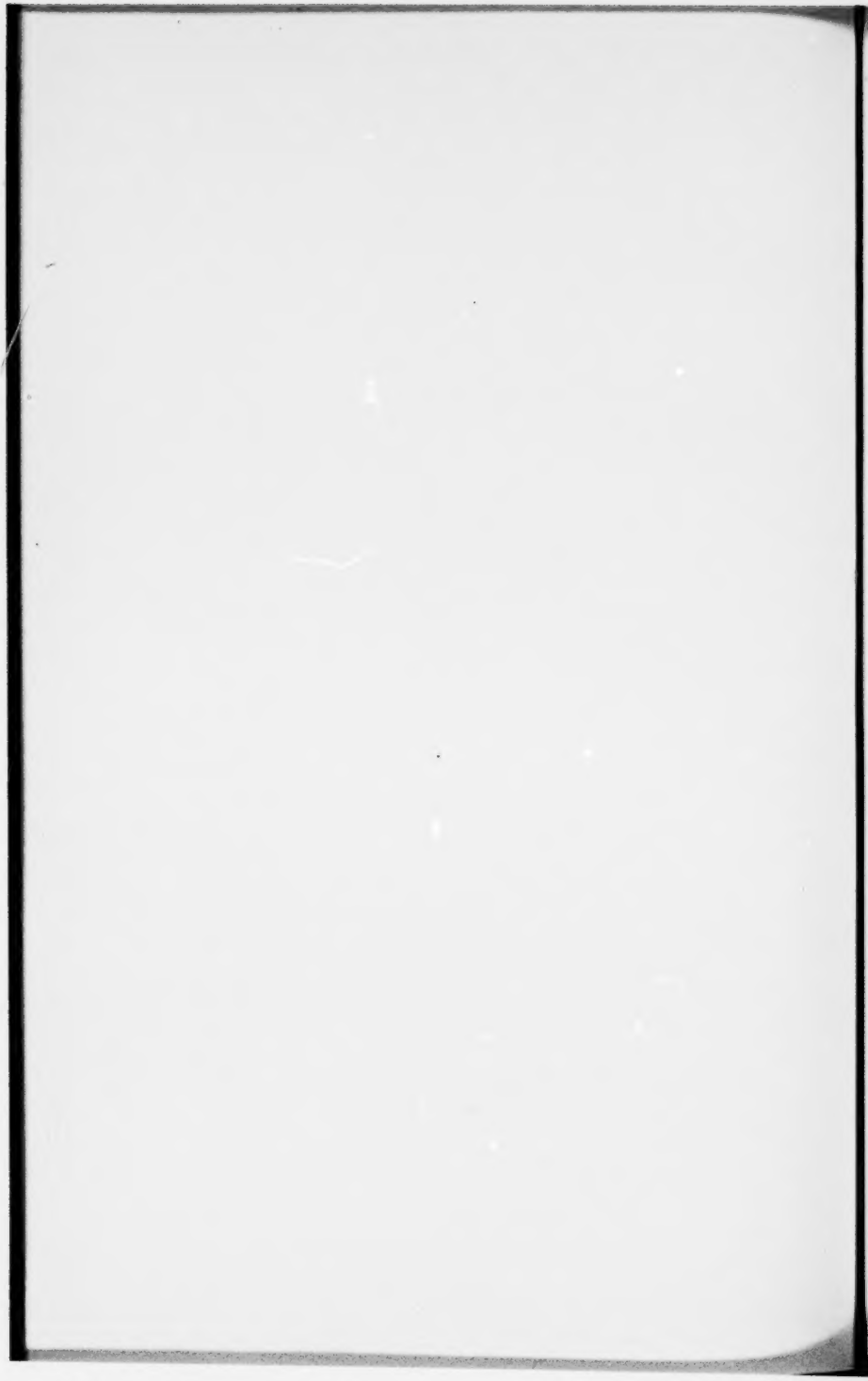
THE CITY OF NEW YORK.

PETITION FOR REHEARING OF THE PETITION FOR CERTIORARI

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

GLEN N. W. MCNAUGHTON,
Of Counsel.

May 26, 1943.



Supreme Court of the United States

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Petitioners,

vs.

THE CITY OF NEW YORK.

PETITION FOR REHEARING OF THE PETITION FOR CERTIORARI.

Now come the above named petitioners, Metropolitan-Columbia Stockholders, Inc., and Lawrence Wards Island Realty Company, petitioners, and present this their petition for a rehearing of the petition for certiorari in this case.

I.

Jurisdiction.

The petition for certiorari was filed March 13th, 1943, and was denied on May 3rd, 1943. This petition is filed within less than twenty-five days thereafter, under rule 33 (28 U. S. C. A. 354).

II.

Reasons for Petition for Rehearing.

On re-analysis, it is found that neither the petition for certiorari, nor the supporting briefs, specifically point out that the error of the Supreme Court, as affirmed by the Court of Appeals of the State of New York, upon the question of general law involved was the controlling factor in

the case. That error lay in interpreting Chapter 2, Laws of 1896, section 2 of which reads:

> "For the purposes of carrying out the proceeding section of this act, the Mayor, Aldermen and Commonalty of the City of New York are hereby authorized and directed to lease to the State of New York, at an annual rental of one dollar, the island known as Wards Island, now owned by the City of New York, together with all the buildings & improvements thereon and the equipment, fixtures and furniture of the asylums for the insane located on the said island."

and Chapter 139, Laws of 1908, amended Chapter 696, Laws of 1913, authorizing a new lease for fifty years of the island known as Wards Island "now owned by the City of New York", in a manner which impaired the obligations of the contract contained in Deed of Water Grant of 1811 to the Tideway and lands under water surrounding Wards Island, which grant conveyed the fee simple title to the predecessors in title of your petitioners for the beneficial use and enjoyment of said lands without any restrictions. Such interpretation by the judgment in the Supreme Court was in violation of Article I, Section 10 of the United States Constitution. It is by virtue of this legislation ordering and directing the lease that the City of New York claims title by adverse possession through its tenant the State of New York (R. 238, fols. 538-9).

A correct ruling, in accordance with this Court's decisions on that question of general law, must have resulted in a different disposition of the case.

In *Appleby* v. *The Mayor,* 271 U. S. 364, at 380, Chief Justice TAFT held this Court had jurisdiction, saying:

> "Ordinarily this Court must receive from the Court of last resort of a State its statement of state law as final and conclusive, but the ruling is different in a case like this. Jefferson Bank *v.* Skelley, 1 Black 436, 443; University *v.* People, 99 U. S. 309, 321; New Orleans Water Company *v.* Louisiana Sugar Company, 125 U. S. 18, 38; Huntington *v.* Attwill, 146 U. S. 657, 684; Mobile & Ohio Railroad *v.* Tennessee, 153 U. S. 486; Louisiana Railway & Navigation Company *v.* New

Orleans, 235 U. S. 164, 170, 171; Long Sault Co. *v.* Call; 242 U. S. 272, 277; Columbia Railway *v.* South Carolina, 261 U. S. 236, 243."

In *Illinois Central Railroad* v. *Illinois,* 146 U. S. at 446, this Court held a riparian right was property and could not be arbitrarily impaired.

The question of the impairment of contract of petitioners by the occupancy of the City through its tenant the State under the legislation authorizing the City's lease of Wards Island to the State was necessarily raised and presented to the Court at the trial in the hearing of objection of the Metropolitan-Columbia Stockholders, Inc., No. 21, R. 26, and objection of the Lawrence Wards Island Realty Company, No. 27, R. 38, to the tentative decree, in Point III of brief of petitioners in the Appellate Division, First Department, in petitioners' briefs in Court of Appeals, and by the introduction in evidence of the Lease itself, its preamble specifically setting up Chapter 139, Laws of 1908, amended Chapter 696, Laws of 1913, City's Exhibit 26, R. 134, and by Point II(2) Respondent's Appellate Division brief.

The affirmance by the Court of Appeals of the judgment of the Supreme Court necessarily raised the question of the impairment of the vested right of your petitioners under the Water Grant of 1811 in violation of Article I, Section 10, of the United States Constitution by legislation of State of New York enacted subsequent to the contract contained in said Grant.

This condemnation proceeding involves eleven different damage parcels, consisting of three different main classifications. These damage parcels are located in various and differing sections of Wards Island. Each classification raises different federal questions.

Your petitioners regret they did not present to this Honorable Court the points involved with sufficient clearness in their previous petition for writ of certiorari and supporting briefs. It is entirely their fault.

In order to present the points involved clearly to this Honorable Court we classify these parcels as follows:

Classification I.

Damage Parcels.	*Federal Question.*	*Classification.*
16 C 17	Impairment of Contract in violation of Section 10, Article I, U. S. Constitution, by Legislation subsequent to Water Grant of 1811 from State of New York granting a fee simple title to predecessors in title of petitioners with unrestricted beneficial rights in grantees. City Ex. 17, R. 331.	Lands under water. Title awarded to City o grounds of adverse possessio through occupancy by State a tenant of City under authori of Chapter 2, Laws of 189 State of New York, Chapte 139, Laws of 1908, amende Chapter 696, Laws of 191 authorizing and directing th execution of the lease by th City to the State of the islan known as Wards Island "no owned by the City of Ne York." City Ex. 26, R. 13 Acts of adverse possessio alleged by City: building se walls and filling in tidewa and lands under water and tak ing possession through its ten ant under lease authorized b Ch. 2, Laws 1896, Ch. 13 Laws 1908, amended Ch. 69 Laws 1913. Opinion Supreme Court, a affirmed by Court of Appeal R. 239, fol. 538. It is by this legislation th City claims ownership by ad verse possession through it tenant the State of New Yor

Classification II.

Damage Parcels.	*Federal Question.*	*Classification.*
5, 5A,	Title res judicata.	Lands under water filled i and lands under water.
9, 9A, 16, 16A.	Award of title to City is in violation of 14th Amendment of U. S. Constitution, under due process provisions. Deeds to Marsh were introduced in Beach case as Exhibits B and	Title awarded to City o grounds of execution of deed to Marsh made during pend ency of application for Wate Patent of 1811 by Barth olomew Ward, one of th signers of the application an

CLASSIFICATION II—(*continued*).

Damage Parcels.	*Federal Question.*	*Classification.*
	C. The title in that partition action was awarded to predecessors in title of petitioners after hearing on effect of Marsh deeds. See Notice of hearing, Copy Liber Equity Judgments, Vol. 202, p. 559. Claimant's Ex. U, R. 187.	alleged to have been delivered by him to Marsh before the issuance of the Patent by the State, to which application Marsh was not a signer.
	The City was a party to the partition suit and accepted its allotments of lands under that decision partitioning the tidelands and lands under water held in common.	

CLASSIFICATION III.

Damage Parcels.	*Federal Question.*	*Classification.*
16 D	Award of one dollar is not just compensation and is in violation of and repugnant to due process provisions of the 14th Amendment of U. S. Constitution.	Lands under water.
17 A		Title awarded to petitioners.
25 A		One dollar was awarded as just compensation on grounds that the cost of filling in lands under water would exceed their market value after the filling in. R. 239, fol. 538.
	The owner is entitled to the fair market value under the 14th Amendment to the U. S. Constitution. U. S. *v.* Tennessee Valley Authority *v.* Powelson, U. S. Supreme Court May 17, 1943. The award of one dollar to petitioners is in violation of the 14th Amendment. U. S. *v.* Miller, 317 U. S. 369, 374.	Depth under water of these lands is one foot.
	There was no evidence of the cost of filling in these damage parcels introduced anywhere in the record. Therefore the finding by the court that these lands under water must be filled in in order to have substantial value is not supported by any evidence in the record, and is in violation of due process provisions of the 14th Amendment.	

CLASSIFICATION III—*(continued)*.

Damage Parcels.

Federal Question. *Classification.*

The holding that lands under water have no substantial value unless filled in is contrary to the practice of the State of New York in selling its lands under water for ¼th of the value of the adjoining upland lots, a practice that has been followed by the State for many years and through which the State has received millions of dollars. The receipts for these lands is devoted under the law exclusively to park purposes by the State.

The holding is contrary to the recent judgment of the Court of Claims of the State of New York awarding $50,000. for two small parcels of lands under water in the Harlem River, near Spuyten Duyvil, in the case of Johnson Iron Works in 1936.

The holding of nominal value for lands under water unless filled in is contrary to the practice of the City of New York in leasing its unfilled in lands under water at substantial annual rentals, and to its policy of claiming high values for its lands under water condemned by the United States Government now pending in the U. S. District Court for the Southern District of New York (Pier 88; "U. S. S. Lafayette" salvage case) and in U. S. District Court of the Eastern District of New York, Wallabout Basin condemnation for extension of U. S. Brooklyn Navy Yard, where the City is claiming millions of dollars for its lands under water.

The City pays the State of New York one dollar for its

CLASSIFICATION III—*(continued)*.

Damage Parcels.

Federal Question. *Classification.*

lands under water, and in Wards Island when condemning these lands claims they are worth only one dollar, but seeks millions when claiming an award for the condemnation of them by the United States, or for any reason it must assess the cost of these lands acquired for city parks to a larger upland area. Such inconsistency should shock the conscience of a court of equity.

The holding of nominal value for lands under water unless filled in is contrary to the rule of property long established by the highest court in this state and confirmed by the Appleby case, 271 U. S. 364, which was sustained by the Appellate Division of the First Department of this State in North River Water Front case, 219 A. D. 27, at 34, and which Mr. Justice McLaughlin on July 1, 1941 in Re Waterfront and Harbor case, 30 N. Y. Sup. (2nd) 187, (the judge in this instant case), stated that "the Appleby decision is the final and controlling authority is made clear by the Appellate Division, First Department, in the matter of the City of New York North River Waterfront, 219 A. D. 27." This last case awarded for two parcels of underwater lands under water where the depth was forty feet, and area 60,000 square feet, the sum of $825,958. It is in the Hudson River at the foot of 44th to 47th Streets, New York City. This is one-half the area of Damage Parcels 16-D and 17-A in the instant case, taken together, and which are only one foot under water.

CLASSIFICATION III—*(continued)*.

Damage Parcels.	*Federal Question.*	*Classification.*
	The rule of substantial value for lands under water was followed in Matter of City Island (Main St.) 216 N. Y. 67, 68; and in Inwood Park in the Borough of Manhattan, 219 A. D. 478, where $252,000 was awarded for lands under water in the Hudson River where the depth was 40 feet under water, and area about 500,000 square feet, subject to riparian rights of upland owners, about four times larger than Damage Parcels 16-D and 17-A together in the instant case; and also in the award of $210,000 for lands under water in the Fort Washington Park case where the depth was 40 feet, and area twice the size of the instant Damage Parcels 16-D and 17-A.	
	The previous Wards Island condemnation case, 158 Mis. 684, R. 238, where the same judge as in the instant case awarded one dollar for a damage parcel of lands under water taken by the City concerns a parcel of land that has no comparable value to the damage parcels in the instant case. It was Water Lot 18, located at the foot of Negro *Bluff* on the East River, and immediately adjoined a hill 40 feet in height adjacent to the waterfront, which rendered the underwater plot unfit for building wharves or docks as inland transportation to such docks or wharves would be too costly and difficult for the grade up hill from the docks or wharves is 50%, and impossible for heavy loads to be carried by trucks from the docks or wharves. A dock is a slip; and a wharf is a pier at which to unload vessels.	

CLASSIFICATION III—*(continued)*.

Damage Parcels.	*Federal Question.*	*Classification.*
	All the damage parcels in the instant condemnation proceeding on the contrary are favorably located for the building of docks or wharves as they are adjacent to large areas of flat inland upland plots with plenty of room for movement and turning of trucks carrying goods to and from docks or wharves on the waterfront, and are therefore of substantial value for dockage and wharfage operations.	

CLASSIFICATION IV—MISCELLANEOUS.

Damage Parcels.	*Federal Question.*	*Classification.*
Westerly half	No title to uplands adjoining in Marsh in evidence.	Portions of Damage Parcels. Lands under water and lands under water filled in.
9	His grantor had no title to the uplands.	Title awarded to City on grounds of Marsh deeds.
9 A	The award of title to the City is a violation of the due process clause of the 14th Amendment of U. S. Constitution.	
The portion of Damage Parcel 17 in front of Upland lots, Nos. 46, 47, and 48 Bridges Map of 1807.	There is no evidence in the record of the building of the sea walls and filling in by the City. They were decided in the Beach case not to be an improvement of the tideway in such a manner as tidelands are usually filled in in the Harbor of New York. See testimony of Rudolph Rosa, Civil Engineer, Copy Liber 202 Equity Judgments, page 373, Claimant's Exhibit U. R. 187, (Record in Beach case), wherein Engineer Rosa testified: Q. "In your judgment as a practical engineer (referring to sea	Lands under water filled in. Title awarded to City by adverse possession because of building of sea walls and filling in by City. These sea walls were built and filling in done in 1870 or prior; a period 23 years before the City took title to the uplands adjacent to these parcels. The decision by the Supreme Court, as affirmed by the Court of Appeals, that the City filled in, bulkheaded and built on the tideway lands is not sup-

CLASSIFICATION IV—MISCELLANEOUS—*(continued)*.

Damage Parcels.	*Federal Question.*	*Classification.*
	walls and testimony of John C. Hearne, superintendent of construction of sea walls in 1870 erected by Commissioners of Emigration then owners of the uplands adjoining tideway in front of damage parcels 16, 16-A, 16-C and 16-D, and 17 and 17-A (and heard by Rosa); do they at all improve the lands of the Water Right for purposes of wharfage or dockage." A. "No, sir." At page 374 (*ibid*): Q. "In their present location are those walls of any improvement or benefit to the lands under water for such purposes as such lands are usually used in and about the harbor of New York." A. "No, sir." The award is violative of the due process clause of the 14th Amendment of the U. S. Constitution. The upland owners completely destroyed the foreshore by building the sea walls. The tideland owners thereafter could no longer use the power of the tide to raise boats at high tide, and repair the boats when the tide was low, and refloat the boats off again at the return of high tide. The subservient tenement was completely destroyed by the upland owner who had the right of easement of passage over the subservient tidelands, and by his wrongful act thus lost his easement of access in destroying the subject of his easement.	ported by the evidence in the record. A seawall is not a bulkhead where vessels may load and unload cargoes. See East River Drive case, 289 N. Y. Sup. 433 at 448. A seawall is built to prevent the upland from being washed away by the river current, and is not constructed in the aid of commerce or navigation as an improvement of the tidelands. It will not support a claim for adverse possession under Section 40, Civil Practice Act of the State of New York.

CLASSIFICATION IV—MISCELLANEOUS—*(continued)*.

Damage Parcels.	*Federal Question.*	*Classification.*
	The beach or tideway could no longer be rented for use for storing boats or repairing them. The beach was gone.	
U. S. Lighthouse deed portion Damage Parcels 5 and 5 A.	The judgment of Supreme Court on U. S. Deed executed under authority Chapter 386 Laws, 1902, New York, amended, Chapter 639 Laws 1903, amended, Chapter 619 Laws 1904, by City to U. S. Government, is, as affirmed, related back to effect the taking of property by United States from petitioners in violation of 5th Amendment to U. S. Constitution and is a taking of private property without just compensation by action of the United States in taking possession of lighthouse plot portion of damage parcels 5 and 5 A. (U. S. *v.* Tennessee Valley Authority *v.* Powelson, supra.)	

The lands under water belonging to the City of New York are carried at high assessment values on the City's tax books, but they are are exempt from taxes, but by adding to the City's taxable values of lands, they enable the City to claim a large share of the funds collected by the State and distributed to the cities. The lands under water on Wards Island were taxed to petitioners at high value, and petitioners have paid over $40,000 taxes since the land was partitioned and titles awarded to them or their predecessors in title in 1870. The City assesses its waterfront lands at $1,000 a front foot on the west side of the Harlem River opposite Wards Island, and obtained high rentals for them. They assess lands under water on the Hudson River at high values, but all exempt from taxes. This does not prove value, but it shows the inconsistency as the City pays the State only one dollar for lands under water when

it obtains them from the State, yet carries them at high values on its tax books to obtain a larger share of the State's moneys. This is a pernicious system, but an explanation for the reason of these high values and then low values claimed by the City may aid the Court in understanding the inconsistency.

The City's share of the State-collected taxes is estimated by State Comptroller Moore during the present fiscal year to be $40,332,260. (See The New York Times, Late Edition, page 25, Column 1, May 18th, 1943.)

High tax assessments by New York City has caused a bear market in real estate since November 16th, 1937, when the petitioners' property was condemned, and six months after Wards Island was connected by vehicular access over the bridge to Manhattan. The financial weakness of New York City was chiefly caused by the City's paying twice the normal rate of interest that 20-year prime securities carry. Prime bonds receive 2%, and the City pays 3½, 4 and 4½ per cent interest on its 20-year and over bonds. This causes a high tax rate, and forces a low real estate market as the City taxes must be raised to meet the loss. The City overlooks the saving of over $250,000,000 to be had by reorganizing its bond issues, but states it is necessary to raise taxes.

This has a strong bearing on condemnation awards as the fair value theory is used in appraising real property in making awards in condemnation for just compensation. The fair value is based upon the price a willing buyer will pay a willing seller in a normal free market. Money market conditions are at least half the cause of why there is or is not a normal free market with investors and operators free to move in or out of the market in response to the conditions of supply and demand. (See The New York Times, Late Edition, page 25, Column 3, May 18th, 1943.)

U. S. v. *Miller, supra,* 374.

Boom v. *Patterson,* 98 U. S. 403.

McCandless v. *U. S.,* 298 U. S. 342.

U. S. v. *Tennessee Valley Authority* v. *Powelson,* U. S. Supreme Court, May 17, 1943.

The controlling questions therefore are:

Did the judgment of the Supreme Court as affirmed by the Court of Appeals impair the obligation of a contract contrary to Article 1, Section 10 of the United States Constitution?

Was the decision of the Supreme Court as affirmed by the Court of Appeals in violation of the due process provisions of the Fourteenth Amendment of the United States Constitution?

Was the judgment of the Supreme Court as affirmed by the Court of Appeals in violation of the 5th Amendment of the U. S. Constitution prohibiting the taking of private property without just compensation by the United States, and of the 14th Amendment without due process?

On those questions, the judgment of the Supreme Court as affirmed by the Court of Appeals of the State of New York is in direct conflict with the applicable decisions of this Court, to wit, on impairment of a contract, *res judicata*, no evidence to support findings as contrary to law, and on taking of private property without just compensation.

Public Importance

The decision of the court below as affirmed is likely to cause future uncertainty of titles and encourage litigation by the re-opening of questions concerning them that have previously been settled by the courts. The failure to sustain the rule that *res judicata* completely settles the controversy between parties to the suit not only disturbs titles in the State of New York, but throughout the nation.

The decision overturns important practices of the departments of nearly three-fourths of our States in their present practice of selling lands under water belonging to the States at substantial values, and will seriously affect the finances of those states, many of which devote the proceeds of sales of their tidewater lands and lands under water

exclusively to school purposes by special laws enacted to support public education; such as New Jersey.

The finances of the United States, municipalities, and individuals owning waterfront property will be seriously affected if this decision as to nominal value for lands under water unless filled in is sustained by this Court, and will involve millions of dollars of loss in federal, state and municipal revenues throughout the nation. New York City is specifically exempted by special law which forbids it to sell its waterfront property and may therefore afford to seek this decision.

For the foregoing reasons, Metropolitan-Columbia Stockholders, Inc., and Lawrence Wards Island Realty Company, petitioners, respectfully urge that a rehearing be granted, that upon further consideration the order denying the petition for certiorari be revoked, and that the writ of certiorari issue.

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

I, Archibald N. Jordan, counsel for the above named petitioners, Metropolitan-Columbia Stockholders, Inc., and Lawrence Wards Island Realty Company, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

ARCHIBALD N. JORDAN.

GLENN N. W. MCNAUGHTON,
Of Counsel.